Leow Teow Beng v Liew Chun Wah & Ors

HIGH COURT (KUALA LUMPUR) — PROBATE NO S2(S5)-32-207 OF 1995
ABDUL MALIK ISHAK J
14 JANUARY 2000

Civil Procedure *— Affidavits — Use of affidavit filed in previous proceedings — No affidavit in rebuttal to present application filed — Whether exhibit can be relied upon to contest present application — Whether O 32 r 13(2) of the Rules of the High Court 1980 must be strictly complied*

An application (encl 95) for an order to stay execution of a consent order was filed by the intervenor. It was supported by an affidavit (encl 94) with documents marked as exhs A, B, C, D, E, F and G annexed to it. The caveators did not file an affidavit in rebuttal to that of encl 94 but gave notice to the intervenor of their intention to rely on exh G that was annexed to encl 94 to contest the application in encl 95. The intervenor objected to the stand adopted by the caveators and argued that what was done was in contravention of O 32 r 13(2) of the Rules of the High Court 1980 ('the RHC').

Held:

(1) Exhibit G of encl 94 could not be relied upon by the caveators to contest encl 95. Exhibit G could not speak nor appear in this court for the benefit of the caveators unless it is annexed as an exhibit to the affidavit-in-reply of the caveators by way of a rebuttal to encl 94. Alternatively, there has to be an affidavit-in-reply filed by the caveators adopting the averments in exh G (see p 242B–C).

(2) It would be tantamount to making a statement at the bar if the caveators were allowed to rely on exh G to contest encl 95 without having to affirm an affidavit-in-reply enclosing exh G. A strict requirement of O 32 r 13(2)(2)(b) of the RHC must be adhered to (see p 244C–D).

[Bahasa Malaysia summary

Suatu permohonan (lampiran 95) untuk suatu perintah penangguhan pelaksanaan suatu perintah persetujuan telah difailkan oleh pencelah. Ia telah disokong oleh suatu afidavit (lampiran 94) bersama-sama dengan dokumen-dokumen yang ditandakan sebagai eksh A, B, C, D, E, F dan G yang dilampirkan bersamanya. Pengkaveat-pengkaveat tidak memfailkan suatu afidavit untuk mematahkan lampiran 94 tetapi memberikan notis kepada pencelah akan niat mereka untuk bergantung kepada eksh G yang dilampirkan bersama-sama lampiran 94 untuk mencabar permohonan tersebut di dalam lampiran 95. Pencelah telah membantah kepada pendirian yang diambil oleh pengkaveat-pengkaveat dan menghujahkan bahawa apa yang telah dilakukan adalah bercanggah dengan A 32 k 13(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

A **Diputuskan** :

(1) Ekshibit G di dalam lampiran 94 tidak boleh digantung harap oleh pengkaveat-pengkaveat untuk mencabar lampiran 95. Ekshibit G tidak boleh dikemukakan di mahkamah ini untuk kebaikan penkaveat-pengkaveat kecuali ia dilampirkan sebagai ekshibit kepada afidavit balasan pengkaveat-pengkaveat melalui pematahan kepada lamp 94. Sebagai alternatif, mestilah terdapat afidavit balasan yang difailkan oleh pengkaveat-pengkaveat menerima pakai penegasan-penegasan di dalam eksh G (lihat ms 242B–C).

(2) Ia hanya terjumlah kepada membuat suatu kenyataan di mahkamah jika pengkaveat-pengkaveat dibenarkan untuk bergantung kepada eksh G untuk mencabar lampiran 95 tanpa keperluan untuk mengikrarkan suatu afidavit balasan yang memasukkan ekshibit tersebut. Suatu keperluan tegas di bawah A 32 k 13(2)(2)(b) KKMT mestilah dipatuhi (lihat ms 244C–D).]

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Cases referred to

Asia Video Enterprise v Liew & Co [1995] 1 CLJ 807 (refd)
Calex-HLK Ltd v Nordin bin Abdul Hamid & yang lain [1997] 5 MLJ 589 (refd)
Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206 (refd)
Citibank Bhd v Leong Wey Pyu & Anor [1998] 3 CLJ Supp 1 (refd)
KS Chua & Co v Chui Miang Chew & Ors [1995] 4 MLJ 436 (refd)
Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39 (refd)
Majlis Daerah Dungun v Tenaga Nasional Bhd [1998] 1 MLJ 708 (refd)
Palaniappa Chettiar v Tan Jan & Anor [1965] MLJ 182 (refd)

Legislation referred to

National Language Act 1963/1967 s 8
Rules of the High Court 1980 O 32 rr 13(2)(b), O 41 r 10(2)

KM Chan (*Lim Kian Leong & Co*) for the intervenor.
Murthi (*Murthi & Partners*) for the caveators.

Abdul Malik Ishak J: On 5 January 2000, encl 95 which was an application by the intervenor for the following orders:

(a) to stay execution of the consent order dated 13 November 1997 pending the final outcome of the civil case in Shah Alam High Court vide Civil Suit No 22–779–98 ;

(b) for costs of the application be costs in the cause; A

(c) and any other order which this court thinks fit.

was scheduled for hearing before me but somehow it did not get off the ground. Enclosure 95 was dated 29 October 1999 and it was filed on the same day. Enclosure 95 was supported by an affidavit in support affirmed by the intervenor himself on 29 October 1999 and filed on the same day as B seen in encl 94. Annexed to the affidavit in support in encl 94 were documents marked as exhs 'A', 'B', 'C', 'D', 'E', 'F' and 'G' and each of these exhibits were bound up together and separately attested by the commissioner for oaths.

The caveators did not file an affidavit in rebuttal to that of encl 94. The C caveators through Mr Murthi admitted that they had no intention to file an affidavit in rebuttal and they said that they would be relying on exh 'G' that was annexed to encl 94 to contest the application in encl 95. Mr Murthi submitted that he had given written notice to the intervenor of the caveators' intention to use exh 'G' of encl 94 with a copy to the court. But unfortunately that written notice was nowhere to be found in the court file. D Mr KM Chan for the intervenor objected vigorously to the stand adopted by the caveators and argued that what was done was in contravention of O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC'). Nevertheless, Mr KM Chan admitted that he was in receipt of that written notice. The arguments were adjourned to the next day ie on 6 January 2000, to enable Mr Murthi to do some research and that adjournment was E granted with the concurrence of Mr KM Chan. That adjournment was at the behest of Mr Murthi.

At the next adjourned hearing, Mr Murthi threw the net of his arguments wider when he submitted that he would be relying on all the exhibits annexed to the affidavit in support in encl 94. There was no written F notice of such an intention transmitted to the intervenor or to the court. That submission must be a submission made with the benefit of an overnight research or was it an exercise in the mechanics of an afterthought.

Notwithstanding that there was no affidavit filed by the caveators, Mr Murthi had the audacity to rely on O 32 r 13 (1)(b) of the RHC by merely giving notice to the intervenor to say that the caveators are G 'intending to use in any such proceedings any affidavit filed by him in previous proceedings' in contesting encl 95. Order 32 r 13 (1) of the RHC reads as follows:

> Any party —
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> (a) filing an affidavit intended to be used by him in any proceedings in H Chambers ; or
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> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
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> must give notice to every other party of the filing or, as the case may be, of his intention to do so. I

and its scope is not that wide as one would expect it to be for it is restricted and governed by the words 'filing an affidavit' as per O 32 r 13(1)(a) of the

RHC and by the words 'any affidavit filed by him in previous proceedings' as per O 32 r 13(1)(b) of the RHC. In so far as O 32 r 13(1)(b) of the RHC is concerned the pertinent question to pose would be: Whether the caveators have filed any affidavits in previous proceedings relating to Probate No S2(S5)–32–207–95 (in reference to the present proceedings) to warrant them to given written notice to the intervenor of the caveators' intention to use exh 'G' of encl 94 to oppose encl 95? The answer would simply be in the negative. According to Mr Murthi, he was entitled to rely on exh 'G' that was annexed to encl 94 in order to contest the application in encl 95. Mr KM Chan in a style of his own submitted that by virtue of para 14 of encl 94, the intervenor merely proposed to rely on para 4 of exh 'G' that was annexed to encl 94. Now, exh 'G' that was annexed to encl 94 and bandied around by both parties in the course of their submissions was in fact an affidavit in reply of Liew Choy Peng who affirmed that affidavit on 18 September 1998 in relation to a case in the High Court of Shah Alam vide Civil No MT 2–22–779–98 where the parties were:

(1) Liew Chum Wah
(2) Liew Choy Lan
(3) Liew Choy Kheng
(4) Liew Choy Peng
(5) Liew Choi Hung ... Plaintifffs

AND

(1) Liew Chee Seng
(2) Wong Yeok Song
(3) Yeap Cheng Hoe
(4) Harta Pusaka Liew Ping @ Liew Ping Lam
... Defendants

How could the caveators rely on the affidavit in reply of Liew Choy Peng that was filed in relation to a case in the High Court of Shah Alam vide Civil No MT 2-22–779–98, referring to exh 'G', to contest the application in encl 95 in the present proceedings before me without deposing an affidavit and annexing exh 'G' itself? Order 32 r 13(2)(b) of the RHC states as follows:

> (2) Save as otherwise provided in these rules —
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

and it was introduced by amendments made to the RHC vide PU (A) 192/93 specifically to prevent adjournments on the grounds of filing affidavits in reply or further affidavits, as the case may be. Without a doubt, its introduction facilitates speedy disposal of chamber matters. I did say in *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 that this rule must be read strictly and that the courts are not obliged and indeed are precluded from considering any affidavits filed out of the 14 day period

unless applications to file those affidavits out of time are formally made and granted by the court. Affidavit in reply must be filed and served within 14 days of the party receiving the affidavit which is intended to be replied. Affidavits that were filed out of time without leave of the court must be struck out forthwith. The courts generally are vested with the discretion to extend time for the filing of the affidavit in reply out of time (*Asia Video Enterprise v Liew & Co* [1995] 1 CLJ 807). The cases of *Majlis Daerah Dungun v Tenaga Nasional Bhd* [1998] 1 MLJ 708 and *Citibank Bhd v Leong Wey Pyu & Anor* [1998] 3 CLJ Supp 1 categorically laid down the following salient rule: the 14 day limit only applies to an affidavit in support of an application in chambers and to an affidavit in reply to the affidavit in support, but not to subsequent affidavits.

In my judgment, exh 'G' of encl 94 cannot be relied upon by the caveators to contest encl 95. Bluntly put, exh 'G' of encl 94 cannot speak nor appear in this court for the benefit of the caveators unless it is annexed as an exhibit to the affidavit in reply of the caveators by way of a rebuttal to encl 94. Alternatively, there has to be an affidavit in reply filed by the caveators adopting the averments in exh 'G' of encl 94. Imagine what would happen if this court were to allow the caveators to use and to read exh 'G' of encl 94 to contest encl 95 without the need to comply with the strict requirements of O 32 r 13(2)(b) of the RHC. There would certainly be chaos in our courts. A bad precedent should not be established by the court. In the event the caveators are still adamant in using and reading exhibit 'G' of encl 94, a formal application to extend time to file the affidavit in reply out of time must be made expeditiously and timeously. It is salutary to remember that in filing an affidavit in reply by annexing exh 'G' of encl 94, the caveators must do so in accordance with section 8 of the National Language Act 1963/1967 — meaning in the Malay Language, and that affidavit in reply must be stamped with the correct fee within the meaning and ambit of O 41 r 10(2) of the RHC. Stamping with the appropriate fee is the only sure way to enable the affidavit in reply — if the caveators propose to file one, to be used in these proceedings (*Calex–HLK Ltd v Nordin bin Abdul Hamid & Yang Lain* [1997] 5 MLJ 589).

Undaunted and going on an uphill task, Mr Murthi submitted that the intervenor had exhibited exh 'G' in encl 94 and the intervenor based encl 95 on this very exhibit. Thus, the caveators too, so say Mr Murthi was entitled to rely on exh 'G' in encl 94 in contesting encl 95. Mr Murthi further submitted that exh 'G' in encl 94 was lawfully before this court and the caveators as the opposing party was entitled to rely on that exh 'G' to demonstrate the infirmity of the intervenor's application in encl 95. The intervenor cannot choose to rely on exh 'G' in encl 94 and at the same time deny the caveators the right to rely on it — so ran the submission of Mr Murthi. He submitted that the case *Calex-HLK Ltd* can easily be distinguished. Every case law is distinguishable. Nobody says that *Calex-HLK Ltd* is all encompassing and covers everything under the sky. *Calex-HLK Ltd* decided on the issue of non payment of the prerequisite fee with the consequent result that the affidavit in that case that was not drafted and filed in the Malay language was held to be inadmissible.

Mr KM Chan in rebuttal rightly pointed out the need to comply with the RHC in strict terms and he again emphasised the failure to file an affidavit in reply enclosing exh 'G' of encl 94 as required under O 32 r 13(2)(b) of the RHC. Mr KM Chan further submitted that in the absence of an affidavit in reply enclosing exh 'G' of encl 94, there was legally speaking no reply by the caveators at all. Furthermore — and this must be the crucial point — Mr KM Chan submitted that the words 'previous proceedings' appearing in O 32 r 13(1)(b) of the RHC were not shown to mean and refer to 'other proceedings'.

As to whether exhibits should form part and parcel of an affidavit, Thomson LP in *Palaniappa Chettiar v Tan Jan & Anor* [1965] MLJ 182 at p 183 had this to say:

> The question, however, did arise as to whether or not certain exhibits to an affidavit formed part of the affidavit and in that connection Lord Herschell LC said that these exhibits:
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> > 'form as much part of the affidavit as if they had been actually annexed to and filed with it.'
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> What is even more in point is what was said by AL Smith LJ. What he said was this:
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> > 'When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense.'
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> In the present case the appellant or his agent said this in the course of his affidavit which was signed:
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> > 'A copy of the statement of account in compliance with sections 19 and 21 of the Moneylenders Ordinance is annexed hereto marked "P3".'
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> So it is. There it is bound up with rest of the affidavit not with thread or wire but with the attestation of the commissioner for oaths.
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> > 'In the circumstances it is impossible to resist the conclusion that the certificate is part of the affidavit and that the signature is attached to the affidavit as a whole and therefore to every part of it.'

Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) in *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 (FC) had this to say of *Palaniappa*'s case (see p 47 of the report):

> Counsel for the appellants argues that *Palaniappa Chettiar's* case is distinguishable. We do not see any significant distinction. *Palaniappa Chettiar's* is in effect an authority for the proposition that 'exhibits to an affidavit formed part of the affidavit as if they had been copied out in the affidavit ...' Since the documents were in fact attached to the affidavit, we see no reason to hold that the learned judge was disentitled to look at the affidavit and the documents annexed to it.

The law develops tremendously and its development is always unimpeded and the future augurs well in this aspect of legal development. Advancing with the times, Gopal Sri Ram JCA delivering the judgment of the Court of Appeal in *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206 in refined language observed at p 219 of the report:

We now turn to consider one other point raised by Mr Sethu. It has to do with the affidavit of Robert Choong Ewe Jin in the 1968 suit to which we referred very early in this judgment. That affidavit was produced by the appellants as an exhibit under an affidavit sworn, filed and used in the court below. Robert Choong has, in that affidavit, accepted that the deceased had a share in the lands in question.

Mr Sethu says that since it was the appellants who produced and relied on the affidavit, it is the same as them having called Robert Choong as a witness and he having given evidence adverse to them. In accordance with settled principles, that evidence would, counsel submits, bind the party who tendered it. See *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 at p 380.

With respect, we do not think it possible to equate the annexing of an affidavit as an exhibit to another affidavit to the calling of a witness who ends up giving adverse evidence. The latter is a much clearer case. The former is not, for a party may produce the affidavit filed in other proceedings to demonstrate that the particular deponent had made a previous inconsistent statement or an admission. So, it depends very much on the purpose or object which the party producing such an affidavit seeks to achieve.

and that ought to whittle away the submissions of Mr Murthi. It would be tantamount to making a statement at the bar if Mr Murthi was allowed to rely on exh 'G' of encl 94 to contest encl 95 without having to affirm an affidavit in reply enclosing that exh 'G' — a strict requirement of O 32 r 13(2)(b) of the RHC must be adhered to. The outcome of this short judgment in regard to the preliminary point advanced by Mr Murthi must surely be decided in favour of the intervenor. The caveators should not be allowed to rely on exh 'G' of encl 94 to contest encl 95. That preliminary point must be dismissed in favour of the intervenor with costs. As an offshoot of this ruling, it was therefore next to impossible for the caveators to rely on the other exhibits annexed to encl 94 in their unholy haste to challenge encl 95. In the interim period, pending the final disposal of encl 95 an interim stay of the execution of the consent order dated 13 November 1997 should be granted indefinitely.

Order accordingly.

Reported by Jafisah Jaafar